

**INTEGRATING
NATIONAL ENVIRONMENTAL POLICY ACT
COMPLIANCE
INTO A
REAUTHORIZED MAGNUSON-STEVENS ACT**

A Council Coordination Committee Concept White Paper

May 2014

Introduction

Fishery management involves fairly rapid cycles of adaptive management in which information about changing conditions is addressed through adjustments to the management program. In this setting, meeting the requirements of the National Environmental Policy Act (NEPA) has caused delays and introduces requirements that duplicate those in the Magnuson-Stevens Act (MSA) and other applicable law. Current rules, guidelines, and directives to comply with NEPA for marine fishery management actions has been overly expensive in terms of workload to both Council and National Marine Fisheries Service (NMFS) staff resources, with negative opportunity costs on other regulatory activities. There have also been instances where current compliance with NEPA has hindered adequate compliance with MSA in terms of providing comprehensive analysis to Councils prior to their taking final action; there also have been instances of alternatives being added or refined after Council action, that are taken into consideration in the Secretarial review process executed under the MSA. The Council Coordination Committee (CCC) recommends integrating the policy objectives and key requirements of NEPA into the MSA, aligned in a timely manner, as a way to address these problems.

The delays in implementing fishery management actions as a result of current NEPA compliance protocols can be significant. Figure 1 shows contemporary timelines for accomplishing the current guidelines and procedures for NEPA, MSA, and the Administrative Procedure Act (APA), assuming the preparation of an environmental impact statement (EIS).¹ This figure is intended to illustrate the prolongation of the Secretarial review process after final Council action is taken under the current MSA process, and thus delay in implementation of any fishery management action. It can be seen that all three statutes require separate public comment periods, which is duplicative and contributes to lengthening the process from Council final action to implementation, in total, there are at least 8 public comment periods if one assumes a regulatory action that encompasses four Council meetings and the existing procedures after final Council action taken under each statute: 4 leading to and including final Council action and 4 subsequent to final Council action. Attachment 1, describing the Pacific Council Groundfish Fishery Biennial Specifications setting process for 2009-10 is a contemporary example of a problematic NEPA compliance process dealing with the implementation delay problem; it shows 632 days between the initiation of the process at the first Council meeting and the first day the resulting regulations were implemented.

A discussion of effort and process duplication problems between the NEPA and MSA requirements quickly becomes a discussion of NEPA protocols, since the current procedures have moved to using NEPA documents to satisfy the analytical requirements of MSA. Thus, the lengthier, more complex, and more staff-expensive NEPA process has essentially subsumed the MSA analytical requirements. While it can be argued that the existing MSA requirements may not be in themselves fully sufficient for a comprehensive review of environmental impacts, the current NEPA compliance protocols include review processes that duplicate what has been, or can be, much more efficiently accomplished in the Council process.

¹ If an environmental assessment (EA) is prepared the 45-day public comment period and related comment response is not required; however, there has been an increasing trend to mandating an EIS instead of an EA, even for routine fishery specification regulations that respond to new scientific information on the abundance of fish stocks.

In addition to the increase in time necessary to accomplish a fishery management action under current NEPA compliance protocols, there is a significant increase in staff workload and process compared to what is required under the MSA. This increase has been overly expensive in terms of workload to both Council and NMFS staff resources, with negative opportunity costs on other regulatory activities. Attachment 2, describing the process yielding the 6,000² page 2004 Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement document is an example of this problem of enormous document volume and associated huge workload. While there is no accounting of the number of FTE staff hours spent preparing this document to its final stage, it is commonly accepted that it is excessive compared to original NEPA statutory direction and was conducted at the cost of addressing many other important, urgent fishery management concerns that were apparent at that time.

There have also been instances where current compliance with NEPA has fallen short of adequate compliance with MSA in terms of providing comprehensive analysis, or even a full description of alternatives, to Councils prior to their taking final action. The MSA process clearly calls for all information to be available to the Councils at the time of a final decision on a recommendation to the Secretary and that the Secretary is to review the Council recommendation on the merits of the administrative record of the Council process. Current protocols using a NEPA document to satisfy MSA analytical requirements can create a problem since the NEPA document is formally an agency document that can be modified after Council final action has taken place. There have been instances of additional analysis being added to the NEPA document, alternatives being added, or alternatives previously rejected being refined and used, prior to the Record of Decision stage in the NEPA process—well after Council final action. Taking such information into consideration in the Secretarial review process executed under the MSA represents a serious shortcoming in an efficient process designed to provide Councils the same full spectrum of information at the time of final decision making that is used in approving, disapproving, or partially approving a final Council recommendation. It also represents a serious shortcoming in the spirit of NEPA to provide for comprehensive analysis prior to decision making, as applied to Council decision making. Attachment 3 is an example from the {insert the appropriate RFMC process} illustrating this particular problem.

MSA Section 304(i) (see Attachment 4), included as part of the 2007 Magnuson-Stevens Reauthorized Act, was intended to more closely align the requirements of the MSA and NEPA within NMFS's NEPA procedures (required by 40 CFR Part 1505). This section directs the agency to promulgate final procedures within 12 months of enactment. In December 2008 NMFS issued a proposed rule for this purpose, which was later withdrawn. NOAA's Office of Planning and Policy Integration has been revising NOAA Administrative Order 216-6, Environmental Review Procedures, but to date this task has not been completed. In 2013 NMFS issued a policy directive "specifically to address the unique timing and procedural requirements of the MSA." However, the CCC does not believe the current approach has made the alignment of NEPA and MSA more timely (quicker), a reduction in extraneous paperwork (smaller documents), nor more concise (less process or workload efficient), as called for in Section 304(i). In the opinion of the CCC, the 2013 policy directive effectively describes the current institutional status quo.

Proposal

The CCC proposes that the MSA be amended to address the aforementioned problems by adding a section to the end of Section 303, Contents of Fishery Management Plans. This new section would incorporate the key parts of NEPA, which requires Federal agencies to prepare "a detailed statement" on "the environmental impact of the proposed action" into the MSA. Currently, MSA Section 303(a)(9)

² Many have heard about a NEPA document of about 7,000 pages for this matter. The draft SEIS was approximately 7,000 pages in length.

requires preparation of a “fishery impact statement” as part of any FMP or FMP amendment. The proposal is to move and expand this section so that it incorporates the key essence of NEPA including a full analysis of environmental impacts and consideration of alternatives. In addition, some important concepts in the Council on Environmental Quality implementing regulations such as the analysis of cumulative impacts and specifying opportunities for public comment have been added. Importantly, the elements of a fishery impact statement currently outlined in MSA Section 303(a)(9) would be retained in the new section. This new section also makes clear that compliance with these requirements would fulfill the requirements of NEPA. Section 304, Actions by the Secretary, is proposed to be amended to clarify how the review of plans, plan amendments, and proposed regulations would take into account the fishery impact statement. Also, a joint Councils-Secretary process is called for that will provide detailed guidelines and procedures on achieving the statutory intent of this proposal.

Conceptually, this proposed approach is similar to how the intent and essential components of the Federal Advisory Committee Act (FACA) was incorporated into the MSA. The FACA calls for several requirements to be satisfied prior to a committee providing formal advice to the federal government, including such things as public access to meetings, timely advance notice of meetings, record keeping, balanced membership, and structured procedures; it also has a lengthy process for legitimizing committees, committee meetings, and committee recommendations. The key features of FACA were incorporated as requirements in the MSA, together with Section 302(i)(1) which states that FACA shall not apply to the Councils, CCC, Scientific and Statistical Committees, or related advisory bodies. Absent this “FACA exemption”, process requirements, delays, and other problems would render the Council role in active marine fishery actions functionally unworkable.

It is important to emphasize that this proposal is not to “get out of” complying with the intent of NEPA, not to avoid a complete and robust analysis of the full spectrum of environment effects of a fishery management proposal, or to shortcut a thorough process by which the input of the public and relevant government entities is considered prior to a final decision. On the contrary, the intent is to mandate that all the important aspects of NEPA compliance are included in a comprehensive and detailed process, that the functional equivalent of full compliance with NEPA statutory language is accomplished, and to that these important functions are achieved in a more efficient way than currently administered.

In summary, the intent of this proposal is to

- Incorporate exact or near exact key NEPA language into MSA Section 303, including
 - A reasonable range of alternatives
 - Full analysis of environmental impacts
 - An analysis of cumulative impacts
- Consolidate public comment guidelines currently adopted for NEPA implementation with those in MSA
 - Figure 2 shows a generic timeline for the proposed new process.
- Retain the conservation and fishery participant impact analysis requirements of the current MSA
- Adjust the language in Section 304 regarding Secretarial review of Council actions to include review of analytical documents for completeness of the new requirements
- Insert language making it clear that if the above requirements are accomplished, then compliance with NEPA has been achieved.
- Insert language describing a joint Council and Secretarial process establishing guidelines and regulations to codify the requirements of this new process.

The specific proposal is as follows. Yellow highlight has been added where the language is identical to the language in the NEPA. Blue highlight has been added where the language is identical to the language in the current MSA.

SEC. 303 CONTENTS OF FISHERY MANAGEMENT PLANS

Delete Sec. 303(a)(9)³ and create new Sec. 303(d)

(d) FISHERY IMPACT STATEMENT – Any fishery management plan (or fishery management plan amendment) prepared by any Council or by the Secretary pursuant to Sec. 303(a) or (b), or proposed regulations deemed necessary pursuant to Sec. 303(c), shall include a Fishery Impact Statement which shall assess, specify and analyze the likely effects and impact of the proposed action on the quality of the human environment.

(1) The fishery impact statement shall describe—

- (A) a purpose of the proposed action;
- (B) the environmental impact of the proposed action⁴;
- (C) any adverse environmental effects which cannot be avoided should the proposed action be implemented²;
- (D) a reasonable range of alternatives to the proposed action²;
- (E) the relationship between short-term use of fishery resources and the enhancement of long-term productivity²;
- (F) the cumulative conservation and management effects,
- (G) economic, and social impacts of the proposed action² on—
 - (i) participants in the fisheries and fishing communities affected by the proposed action;
 - (ii) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and
 - (iii) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery⁵

(2) A substantially complete Fishery Impact Statement, which may be in draft form, shall be available not less than 14 days before the beginning of the meeting at which a Council makes its final decision on the proposal (for plans, plan amendments, or proposed regulations prepared by a Council pursuant to Sec. 303(a) or Sec. 303(c)). Availability of this Fishery Impact Statement will be announced by the methods used by the Council to disseminate public information and the public and relevant government agencies will be invited to comment on the Fishery Impact Statement.

(3) The completed Fishery Impact Statement shall accompany the transmittal of a fishery management plan or plan amendment as specified in Sec. 304(a), as well as the transmittal of proposed regulations as specified in Sec. 304(b).

(4) The Councils shall, subject to approval by the Secretary, establish criteria to determine actions or classes of action of minor significance regarding Section 303(d) (A), (B), (D), (E), and (F), for which preparation of a Fishery Impact Statement is unnecessary and categorically excluded from the requirements of this section, and the documentation required to establish the exclusion.

³ Page 75 of the MSA “Blue Book”

⁴ See 42 U.S.C. 4332, Sec. C

⁵ See MSA 303(a)(9)

(5) The Councils shall, subject to approval by the Secretary, prepare procedures for compliance with this section that provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork and effectively involve the public, including—

(A) using Council meetings to determine the scope of issues to be addressed and identifying significant issues related to the proposed action;

(B) integration of the Fishery Impact Statement development process with preliminary and final Council decision making in a manner that provides opportunity for comment from the public and relevant government agencies prior to these decision points;

(C) providing scientific, technical, and legal advice at an early stage of the development of the Fishery Impact Statement to ensure timely transmittal and Secretarial review of the proposed fishery management plan, plan amendment, or regulations to the Secretary.

(6) Actions taken in accordance with Sec. 303 procedures shall constitute fulfillment of the requirements the National Environmental Policy Act of 1970 as amended 42 U.S.C. 4371 *et seq.*) and all related implementing regulations.

Sec. 304(a) amended as follows:

(a) REVIEW OF PLANS.—

(1) ...

(2) In undertaking the review required under paragraph (1), the Secretary shall—

...[strike “and” from the end of B and at the end of C replace period with “; and”]

(D) evaluate the adequacy of the accompanying Fishery Impact Statement as basis for fully considering the environmental impacts of implementing the fishery management plan or plan amendment.

Sec. 304(b) amended as follows:

(b) REVIEW OF REGULATIONS.—

(1) Upon transmittal by the Council to the Secretary of proposed regulations prepared under section 303(c), the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this Act and other applicable law. The Secretary shall also immediately initiate an evaluation of the accompanying Fishery Impact Statement as a basis for fully considering the environmental impacts of implementing the proposed regulations. Within 15 days of initiating such evaluation the Secretary shall make a determination and—

...

Figures and Attachments

Figure 1. Timelines and key process steps in the existing process of aligning NEPA and MSA compliance requirements.

Figure 2. Timelines and key process steps in the proposed process of achieving NEPA compliance in revised MSA procedures.

Attachment 1. A Description of the Pacific Council 2009-10 Groundfish Fishery Biennial Specifications Process with Particular Reference to Duration Problems.

Attachment 2. A Description of the 2004 Alaska Groundfish Fishery Programmatic Supplemental Environmental Impact Statement Process with Particular Reference to Document Volume and Staff Workload.

Attachment 3. A Description of the {insert specific example name} with Particular Reference to Changes in the NEPA Document Not Known to Council Members at the Time of Final Action.

Attachment 4. Section 304(i) in the Magnuson-Stevens Fishery Conservation and Management Act as Amended Through January 12, 2007

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